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IN THE

Supreme Court of the United States

October Term, 1968
No. 642

EDWARD BOYKIN, JR., *Petitioner,*

vs.

STATE OF ALABAMA, *Respondent.*

On Writ of Certiorari to the Supreme Court of Alabama.

Motion for Special Leave to File Brief as Amici Curiae.

Gerald H. Gottlieb and Earl Klein respectfully move this Court for special leave to file the accompanying brief in this case as *amici curiae,* and for further special leave to file a Volume Two as described hereafter, upon order of the Court.

Inadequate briefing of the issue of unconstitutional cruelty of the death penalty prompts this motion by:

Gerald H. Gottlieb:

—member of the Bars of the Supreme Court of the United States and of California;

—consultant to the Center for the Study of Democratic Institutions;

—author of "Testing the Death Penalty" (publication in 1959—mimeographed; 1961—Appendix A, *infra,* 1963—in *Death Penalty in*

America) proposing that an evidentiary test of the death penalty be made and setting out the evidentiary categories (Appendix A, *infra*);

—author of "On Capital Punishment" (publication 1967, Center for the Study of Democratic Institutions, Appendix B *infra*, 1969 in Journal of Crime and Delinquency), reviewing some of the evidence within those categories (Appendix B *infra*);

—moderator of symposia (at the Center) in 1967 among leading members of various applicable disciplines, gathering the facts on the death penalty;

—counsel (amicus) in the presentation of evidence on the death penalty in *People v. Thornton*, Los Angeles Superior Court in 1967;

—counsel in presentation and argument as *amicus curiae*, dealing with fact and law of death penalty in cases of *In re Anderson* and *In re Saterfield* in the California Supreme Court;

—a director, since 1959, of American Civil Liberties Union of Southern California; proposed (1959) that National ACLU challenge the death penalty on evidentiary grounds, as cruel.

Earl Klein:

—counsel for the past eight years for prisoners on California's Death Row;

—member of the Bars of the Supreme Court of the United States and California;

—counsel in presentation of *amici curiae* brief in cases of *In re Anderson* and *In re Saterfield* in the California Supreme Court;

for special leave to file the attached brief as *amici curiae;* and for further special leave to file upon order of this Court an extensive presentation as Volume Two* of the brief, analyzing the facts and applicable law with respect to the institution of "capital punishment" and the scope of the term "cruel" as it is used in the Eighth Amendment to the United States Constitution.

The question of whether the death penalty is unconstitutionally cruel, it is respectfully urged, is one of the most important questions to reach the Supreme Court in recent decades.

Volume Two's fact and law material on the death penalty has been compiled and classified. However, since it will comprise some 175 pages, and will necessitate additional time for printing, it cannot be filed concurrently with the attached brief; hence special leave is requested to file Volume Two upon order of the Court.

Substantially none of the matters outlined in the attached brief have been covered in briefs already on file with the Court.

It is the position of *amici* that the death penalty is the most dramatic symbol of barbarism present in the United States at this time, and until the question of its constitutionality is disposed of, progress with respect to the constitutional testing of other matters relating to punishment will be forestalled.

The public interest will be served by permitting *amici* to set out an extensive presentation of fact and law on the issue because:

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*Volume Two of our amicus brief is not filed herewith; it will be filed upon grant of permission by the Court.

1. The continued practice of capital punishment affects the character of our society, and prevents full application of the standards of decency consistent with a democratic government;

2. Capital punishment tends to prevent the Eighth Amendment to the United States Constitution from being an effective part of that living instrument for the clear reason that until Death Rows and the death penalty are obliterated, practices less than this maximally cruel institution will not generally be able to be reached;

3. If the death penalty's unconstitutionality is to be found, certainly it ought to be found in a case in which the crime is less than murder, namely, as here, robbery.

Consent to file the attached brief has been given by counsel for the parties, who have advised *amici* that they will file such consents with the clerk of the Court.

This matter was brought to the attention of *amici* only during the present month of April. Immediately upon learning of the case and receiving copies of briefs *amici* have hastened preparations on this motion.

Dated: April 30, 1969.

Respectfully submitted,

GERALD H. GOTTLIEB and
EARL KLEIN,

By GERALD H. GOTTLIEB,
Amici Curiae.

IN THE

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STATE OF ALABAMA,

Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

Brief of Gerald H. Gottlieb and Earl Klein as Amici Curiae.

Interest of Amici.

Gerald H. Gottlieb and Earl Klein are members of the bars of the Supreme Court of the United States and of California. Both have represented prisoners under penalty of death and have presented arguments to courts of California on the issue of capital punishment.

Mr. Gottlieb's interest commenced 17 years ago when he began a study of the death penalty, which led to his proposal made in 1959 to the American Civil Liberties Union and led in 1961 to publication of the article "Testing the Death Penalty" in the Southern California Law Review.* His study continued through

*In the anthology "The Death Penalty in America," the Editor Hugo Bedau, refers to Gottlieb's article as the first to spell out an entire argument against the death penalty on constitutional grounds. Page 170.

the years and in 1967, he authored a paper for the Center for the Study of Democratic Institutions entitled "On Capital Punishment." In 1967, he moderated a symposium at the Center among members of various applicable disciplines in which the facts on the death penalty were gathered. Later that year, Mr. Gottlieb was counsel (*amicus*) in the penalty phase of *People v. Thornton,* in Los Angeles Superior Court, during which the evidentiary facts on capital punishment were presented through expert witnesses.

Mr. Klein has been counsel for prisoners on Death Row at San Quentin since 1961.

In 1968, *amici* prepared and filed with the California Supreme Court, an extensive *amicus* brief of fact and law on the death penalty in the cases of *In re Anderson* and *In re Saterfield.*

Argument.

This brief is directed to the following question: Whether Boykin's sentence of death for the crime of simple robbery violates the prohibition against cruel and unusual punishments contained in the Eighth and Fourteenth Amendments.

Briefly stated, *amici* will show the following: The death penalty is torture. It serves no other purpose than revenge. Revenge is an unconstitutional purpose. Torture is an unconstitutional act. The anguish of the 1000 Death Row days ending in death is incomparably cruel.

The particularities that demonstrate these matters are indicated in part in Appendices A and B hereof, and in extensive detail in Volume Two (to be filed upon

receiving permission of the Court under pending motion). In the next several pages we trace, broadly, the matters dealt with in detail in the appendices hereto, and in Volume Two. (Reference, hereinbelow, is made to parts of the Appendices A and B hereof. Volume II, subject to, this pending motion, will present, with particularity, the law and fact as to each of the following points.)

I.

To ask a Court to consider the cruelty of the death penalty as a question of fact is to ask the Court to do what is required by law. If the death penalty is found to be in fact cruel, the Court must wield the Eighth Amendment to strike down this penalty, for the guarantee against cruel punishment is fundamental.

The burden to determine cruelty of capital punishment cannot be escaped by merely designating the question to be political. Having found cruelty, the Court must strike down capital punishment.

Appendix A, Sec. VIII.

II.

Congressional debate at the time of congressional approval of the Eighth Amendment, and the Congressional intent as found in decisions of this Court, demonstrate that the Eighth Amendment is available as a weapon to strike down cruelty in any form, and is potentially applicable to the mental and physical aspects of Death Rows and the death penalty.

Appendix A, Sec. VII; Appendix B, Postscript.

III.

"Cruelty" is to be defined not in terms of the excesses existing when the term was inserted in the Bill of Rights, but rather in terms of the contemporaneous condition of society.

The scope of the word "cruel", as it has expanded over the centuries, is to be measured by considering society's various pursuits, Consideration of how society has treated its offspring, its seamen, its accused persons, its working females, its cripples, its pupils, its industrial and agricultural workers, its insanes, *et cetera,* in earlier times and at present, are part of the demonstration of the present scope of "cruel" as a category within the Eighth Amendment. If the Court within the rubric of "cruelty", applies the term in its matured meaning, it will sweep away the Death Rows and the death penalty.

Appendix B, Sec. 1.

IV.

Revenge is no longer an accepted objective of punishment. Of the remaining objectives, rehabilitation is negated by death, removal is equally accomplished by imprisonment, and the presence of Death Rows and the death penalty in various states demonstrates no reduction in the applicable crimes, and indeed, correlates with higher incidence of those crimes.

Accordingly, capital punishment serves no permissible objective of punishment; hence is cruel by definition.

Appendix A, Sec. IV; Appendix B, Introduction.

V.

A primary definition of cruelty is "the infliction of pain or loss without necessity or justification". Since no acceptable purposes are served by the death penalty, no necessity can be demonstrated within contemplation of law, and the death penalty therefore must be held to be cruel, again, by definition.

The United States Supreme Court has already indicated that unnecessary pain and loss in the manner of infliction of the death penalty is "cruelty".

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947).

Without a finding of necessity for the death penalty, it must be struck down; this accords as well with these philosophers whose writings are the heritage of the democratic tradition of this nation.

Appendix A, Sec. III; Appendix B, Sec. VI.

VI.

If the death penalty violates the dignity of mankind, it must be struck down. The basic concept underlying the Eighth Amendment "is nothing less than the dignity of man."

Trop v. Dulles, 356 U.S. 86, 100 (1958).

(Extensive evidence on the indignity of the death penalty will be set forth in Volume Two of this brief, which, as noted above, awaits the granting of motion for leave for the filing thereof.)

VII.

If Death Rows or the death sentence are repugnant to the "evolving standards of decency that mark" the progress of society, then those practices must fall under the Eighth Amendment. The death penalty should be held unconstitutional today within the context of the social and cultural conditions of this nation and of the world.

The facts thereof refer *inter alia* to the injuries to the society, to the family of the executed man, and to the manner and effect of the infliction of the 1000 days and nights, and of the death penalty upon the condemned. A part of the evidence showing indecency involves the concealed and clandestine manner of infliction of the penalty, an increasing circumstance in modern times.

Appendix A, Sec. II; Appendix B, Sec. III.

VIII.

The impact of the penalty of death on the relatives of the condemned is ineffable, and is one of the significant secondary inflictions that weigh in the direction of "cruelty."

The effect on the children, the parents, the other relatives, themselves innocent, finds no proper response in the fact that the original crime may have meant the sacrifice of an innocent person, for this type of response cannot even find a basis in the concept of revenge, itself no longer a proper consideration for punishment.

Appendix B, Sec. V.

IX.

The brutality of the death penalty and its effect in arousing the more bestial aspects of humanity, are historically noted facts. Moreover, historically, the more harsh and more severe the scale of punishment, the more degraded is the society found to be, as a correlative thereof.

The act by the state tends to cheapen the values that refer to humanity itself, and tends to diminish the standards of decency and conscience of the host society.

Appendix B, Secs. III, V, and VIII.

X.

Under the pressure of the pendency of death, self-mutilation is a frequent occurrence, both in attempted suicide, and otherwise. Morover, in the death process itself, physical pain is indicated to be present.

Appendix B, Sec. IV.

XI.

Mental pain and anguish, in its most extreme forms and to the most exquisite degree, is evident.

Appendix B, Sec. IV, and extensively in Volume Two of the brief.

XII.

In absolute terms, the death penalty constitutes torture. The evidence of this will be extensively shown in testimony and quoted writings, set out in Volume Two of the brief of these *amici*, the filing of which volume awaits ruling by the Court on the pending motion.

That evidence will show that the death penalty fits within the category of torture; it drives men mad and to suicide. The anguish of the 1000 days on condemned row constitutes a web of suffering for each condemned man, for although he lives in isolation, yet he shares the distress of his fellow inmates. The punctuation each of their lives, by the crises of the sufferings of the others, is described as "piecemeal dying", and a death that comes "day by day, week by week, yearly", according to the most experienced of the chaplains of San Quentin. (Volume Two of this brief*).

The fact of torture is also shown by physicians, psychiatrists and others in attendance, and by others with expert relevant knowledge.

XIII.

If, under one of the primary definitions of cruelty, the test of necessity is applied, the deprivation of life as the culmination of the Death Row process must, because of lack of showing of necessity, be found cruel.

Appendix A, Sec. III; Appendix B, Sec. VI.

XIV.

The world trend today is toward abolition of capital punishment. This is true state by state, federally in the conduct of penal institutions, and across the nations of the world.

*Unfiled, awaiting ruling on pending motion.

Moreover, the expressions by men of wisdom, the great leaders of humanity over the ages, shows an increasing trend to consider the death penalty to be nothing but a part of barbarism, beyond the pale of civilized standards.

Appendix B, Sec. VII.

XV.

One of the ways in which the cruelty of the death penalty is brought into unambiguous focus is by noting that the suffering attendant upon the 1000 days and the death is incomparable; is not matched by any other experience in human activity.

Thus the extremities observed by priests attending parishioners, by physicians attending patients in their most aggravated and painful conditions, of prisoners looking forward to life imprisonment without parole, and of excommunication, have a volume and quantity of anguish less than that noted with respect to capital punishment and its attendant procedures and duration.

The evidence on this matter will be presented in detail in Volume Two of the brief of these *amici*.

Conclusion.

Together, considerations of fact and law, in the appendices of this Volume One and in the detailed showing which these *amici* seek to make upon permission to file Volume Two, demonstrate and will further demonstrate that the death penalty is unconstitutionally cruel.

Moreover, noting that the conviction of Boykin was for a crime in which no life was lost, the force of the facts and law gains a special emphasis. The Eighth Amendment applies to the states by way of the Fourteenth Amendment as held by this Court in *Robinson v. California,* 370 U.S. 660. The sentence of death against Boykin should, we respectfully urge, be held illegal.

Respectfully submitted,

GERALD H. GOTTLIEB and
EARL KLEIN,
By GERALD H. GOTTLIEB,
Amici Curiae.

APPENDIX A.

[Vol. 34, So. Cal. L. Rev. 268, Spring 1961]

TESTING THE DEATH PENALTY

Gerald H. Gottlieb

On the frontiers of public law are to be found issues with special characteristics. The issues hinge on certain ambiguous phrases found in constitutions, treaties and statutes. The meanings of the phrases depend upon changing and dynamic realities of society. These dynamic realities consist, among other things, of the formation and decay of values, the advance of education, increases in knowledge of the human mind and motivations, the continuing evolution of the American economic system, and our developing national self-consciousness vis-à-vis the image of our nation in a world society.

Potentially the issues are thus latently governed by the leverages of social change. The courts, on rare occasions, have redefined the ambiguous phrases.[1] The changed rules of law each time have in turn crystallized new standards and new value for society.

When these changed standards are recognized and understood by society, through pronouncement and enforcement, the realities of society are in turn affected. A churning action operates; the issues communicate be-

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[1]See, Brown v. Board of Education, 347 U.S. 483 (1953); Muller v. Oregon, 208 U.S. 412 (1908); Durham v. United States, 237 F.2d 760 (D.C. Cir. 1956); Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

It has been argued that ambiguous terms in statutes or constitutional provisions are often used purposely by legislatures; they are in effect delegating powers to the courts. See Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 Va. L.R. 23, 39.

tween the basic notions of the law and the basic realities of society. Ultimately, the philosophies of the citizenry are thereby modified. Those legal issues which thus deeply affect and are affected by the philosophies, conditions and values of mankind can be referred to as the "issues-with-leverage."

Within the field of crime and punishment resides one of these "issues with-leverage." The issue hinges on the phrase, "cruel and unusual punishment," which the federal constitution's Eighth Amendment prohibits the federal government from inflicting. This phrase also may apply to state governments, since there is substantial authority to the effect that the Eighth Amendment is deemed incorporated within the due process clause of the Fourteenth Amendment, and that, through the impact of the Fourteenth Amendment upon the states, the states are thereby, albeit indirectly, to a great extent subject to the same inhibitions against cruel and unusual punishment as is the federal government.[2] Also, many states are subject to this limitation because of express prohibitions in their state constitutions similar to the Eighth Amendment.

The Eighth Amendment uses "cruel and unusual," speaking in the conjunctive. However, there is indica-

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[2]Mr. Justice Douglas has stated that: "The infliction of 'cruel and unusual punishments' against the command of the Eighth Amendment is a violation of the Due Process Clause of the Fourteenth Amendment, whether that clause be construed as incorpofating the entire Bill of Rights or only some of its guarantees. . . . For despite Hurtado and Twining, this Court has now held that the Fourteenth Amendment protects from State invasion the following 'fundamental' rights safeguarded by the Bill of Rights . . . at the very least, certain types of cruel and unusual punishment. . . ." Sweeney v. Woodall, 344 U.S. 86, (1952) (dissent). See also NAACP v. Williams, 359 U.S. 550, 551 (1959) (separate opinion).

tion in court decisions that this phrase is intended as disjunctive.[3] The California Constitution is expressly in the disjunctive, enjoining "cruel or unusual" punishment.[4]

I. CAPITAL PUNISHMENT: A MEASURE FOR CRUEL AND UNUSUAL PUNISHMENT

The phrase "cruel and unusual" is profoundly ambiguous. It refers to certain dynamic realities of society and of men's states of mind. Although those realities have been changing during the many centuries since the phrase was coined, judicial definition of the phrase in terms of contemporary society has only recently begun and is incomplete.

One of the punishments yet fully to be tested under the Eighth Amendment, within the context and findings of modern penology, psychology, morals and social requirements, is the death penalty. To proceed

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[3]"Generally viewing the action of the States in their bills of right as to the prohibition against inhuman or cruel and unusual punishments, it is true to say that these provisions substantially conform to the English bill of rights and to the provisions of the Eighth Amendment we are considering, some using the expression cruel and unusual, *others the more accurate expression 'cruel or unusual,'* and some cruel only. . . . It is true that when the reasoning employed in the various cases is critically examined a difference of conception will be manifested as to the occasion for the adoption of the English bill of rights and of the remedy which it provided. Generally speaking, when carefully analyzed, it will be seen that this difference was occasioned by treating the provision against cruel and unusual punishment as *conjunctive* rather than *disjunctive, thereby overlooking the fact, which I think has been previously demonstrated to be the case,* that the term unusual, as used in the clause, was not a qualification of the provision against cruel punishments, but was simply synonymous with illegal, and was mainly intended to *restrain the courts,* under the guise of discretion, from indulging in an unusual and consequently illegal exertion of power. . . ." Weems v. United States, 217 U.S. 349, 401 (1910) (dissent). (Emphasis added.)

[4]CAL. CONST. art. 1, §6.

with such a test would seem important, if for no other reason that this penalty is practiced by the federal government and forty-one of our states.[5]

The constitutionality of the death penalty in the present social setting comprises a substantial and justiciable question and it may tenably be urged that capital punishment is unconstitutional. Capital punishment may, on a sufficient factual showing, be found violative of the Eighth Amendment, since death by means of the gas chamber, gun, rope or electric chair may now with good reason be alleged to be "cruel and unusual" punishment and within the reach of the Eighth Amendment and its state counterparts. An issue of law dependent upon judicially noticeable facts awaits its day in court.

The thesis that the constitutionality of capital punishment is now a substantial question rests in part on decisional law that has defined and explored the notion of cruelty in the Eighth Amendment and the notion of due process in the Fourteenth Amendment in relation to punishment. This thesis is also partially supported by the observations of society from the sixteenth century onward. These observations assist in showing changes in man's consciousness and morality relevant to the concepts expressed in court opinions.

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[5]Nine states have abolished the death penalty: Alaska, Delaware, Hawaii, Maine, Michigan, Minnesota, North Dakota, Rhode Island and Wisconsin. Of the others 22 and the District of Columbia practice electrocution, 12 use lethal gas, 6 use hanging, and in Utah the condemned man has his choice of hanging or shooting. Hanging is the method of execution in the territories of American Samoa, Guam, and the Canal Zone. The federal courts use the method of execution followed by the state in which the sentence is imposed, and if the state does not have a death penalty, the federal judge may prescribe the method for carrying out the death sentence. INFORMATION PLEASE ALMANAC 335 (1960).

Does the death penalty constitute such cruelty as violates the United States Constitution? What measurement shall determine this? Who shall take the measurement? Has the measurement been changed? Does it change?

In past rulings of the United States Supreme Court and state courts, the judges have declined to hold the death penalty to be illegal. However, careful review of the opinions and close analysis of the language of the decisions support the view that the constitutionality of capital punishment depends on questions of judicially noticeable fact. The evidence, responding to the language and opinions of the judges, has not heretofore been presented in any of our courts.

A number of alternate criteria may be applied in a test of the death penalty as a "cruel and unusual" punishment. The judges from time to time have given various definitions to the phrase. Any one of the definitions may become the hinge on which the ultimate question of unconstitutional cruelty may turn. The succeeding sections of this article deal each with one of those hinging definitions and frame one of those testing questions.

II. DECENCY AS A MEASURE

The sentence of death violates the Eighth Amendment to the United States Constitution if the sentence and its execution are repugnant to the evolving standards of decency that mark the progress of our maturing society.

Although expressions by intellectual and moral leaders on criminal punishment have gradually changed over the centuries, the law has only recently begun to

reflect those changes. In one line of cases the phrase "cruel and unusual" in the Eighth Amendment has been defined against the context of the practices carried on several centuries ago. Alongside that static view, today a new view has grown in the law.

The former view is exemplified by an 1890 case, *Ex parte Kemmler*.[6] In that case the United States Supreme Court affirmed that New York's electric chair could be used in administering the death penalty and that the electrocution process did not violate the United States Constitution. The Court held that only such extreme penalties as "burning at the stake, crucifixion, breaking on the wheel, or the like"[7] were within the constitutional prohibition. As recently as 1947, the Supreme Court followed the static view of "cruel and unusual." In the *Resweber* case,[8] the Court sanctioned the return of a condemned man to the electric chair after two abortive attempts at electrocution had failed. In its decision the Court mentioned that the phrase "cruel and unusual punishment" came from the English Bill of Rights of 1688.

However, it should be noted that the period prior to the adoption of our Bill of Rights was marked by a catalogue of cruelties that were unspeakable and disgusting. For example, the philosopher Michel de Montaigne writing of a Roman execution at the end of the sixteenth century stated that the convicted robber was strangled and then cut in quarters before the populace.[9] Blackstone has referred to drawing and quartering, disemboweling, beheading, public dissection, burning at

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[6] *In re* Kemmler, 136 U.S. 436, 446-47 (1890).

[7] *Id.* at 447.

[8] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

[9] 2 MICHEL DE MONTAIGNE, 112-13 (1913).

the stake, dismembering, and branding.[10] To define, as the United States Supreme Court seemed to do in the *Kemmler* and *Resweber* cases, "cruel and unusual" by a mere repudiation of the grosser aspects of torture and of the manifest cruelties of past centuries is to give a poor standard of measurement for contemporary society, to thwart and blunt the phrase and to destroy the protective purpose of our Eighth Amendment.

The advent of the dynamic and contemporary view of the meaning of "cruel and unusual punishment" first came in a 1910 case, *Weems v. United States.*[11] The United States Supreme Court decided that sentence of a defendant to a term of years coupled with the requirement that the defendant must carry a chain hanging from his ankle and wrist, and that he be employed at hard and painful labor and suffer permanent loss of civil rights, constituted the infliction of "cruel and unusual" punishment. Yet that sentence and punishment would have been considered mild in old England both before and after the enactment of the English Bill of Rights. Thus, the Supreme Court in the *Weems* case departed from the rule earlier stated in *Kemmler,* and instead held that the context of old England must not be allowed to determine the meaning of the words "cruel and unusual." Justice McKenna, speaking for the Court, stated that:

> Legislation . . . should not, therefore, be necessarily confined to the form that evil had there-

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[10]2 BLACKSTONE, COMMENTARIES 2620-23 (Jones' ed. 1916). These punishments were carried out after, as well as before, the English Bill of Rights was enacted, but Blackstone asserted that the post-1688 penalties were mild compared with the shocking apparatus of death and torment to be found in the criminal codes of many European countries at that time.

[11]217 U.S. 349 (1910).

tofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemoral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "Designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be. . . .[12]

The *Weems* case did not condemn, nor has any case condemned in principle, the death penalty. It did, however, establish a primary concept that the definition of cruelty shall be fashioned in terms of the present and future needs of society, rather than the public's inclination, or standards regarding cruelty of medieval Europe.

In 1958 the dynamic view of *Weems* received express ratification when the Supreme Court cited that case with approval in its opinion in *Trop v. Dulles*.[13] In the latter case the Court held that excommunication and deprivation of citizenship, as a punishment for desertion, was "cruel and unusual" punishment, and thus, illegal. The Court recognized that "the words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the

[12] *Id.* at 369-73.

[13] 356 U.S. 86 (1958).

evolving standards of decency that mark the progress of a maturing society."[14]

Is the death penalty unconstitutional today within the context of the social and cultural conditions of this nation and of the world? The *Trop* and *Weems* cases hold that the concept of cruelty is a dynamic one. Necessarily, those holdings cause the constitutional question of the validity of capital punishment to be a combined question of law and fact. The facts to be adduced refer to the injuries done to society and to the family of the executed man, the extent of pain, both physical and psychological,[15] and generally the social context in such aspects as are relevant to the problem of crime, crime prevention, punishment and the developing culture and humanity of our country. The issue of constitutionality then requires the judges to be acute observers of the times and of the imperatives which spring from an "evolving standard of decency." If the death penalty is now repugnant to our evolved stand-

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[14] *Id.* at 99-101.

[15] A century-old passage from Dostoevsky's *The Idiot* gives a towering yet touching indication of the cruelty of capital punishment: "But the chief and worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's certain. . . . To kill for murder is a punishment incomparably worse than the crime itself. Murder by legal sentence is immeasurably more terrible than murder by brigands. Anyone murdered by brigands, whose throat is cut at night in a wood, or something of that sort, must surely hope to escape till the very last minute. . . . But in the other case (execution) all that last hope, which makes dying ten times as easy, is taken away for certain. There is the sentence, and the whole awful torture lies in the fact that there is certainly no escape, and there is no torture in the world more terrible. . . ." DOSTOEVSKY, THE IDIOT 19-21 (1958).

ards "that mark the progress of a maturing society," then it seems that capital punishment ought to be struck down by judicial action.

III. THE TEST OF NECESSITY

Whether capital punishment and the processes and proceedings necessarily associated therewith violate the Eighth Amendment can be said to depend upon whether the processes are cruel by definition. Cruelty is properly definable as "the infliction of pain or loss without necessity[16] or justification."[17]

Blackstone considered necessity to be a prerequisite of the death penalty and noted that the necessity must be great and overriding:

> . . . But, indeed where capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity . . . of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public road by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier who defeats or eludes the provisions of former statutes. . . .[18]

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[16]Cruelty: 1. Quality or state of being cruel, disposition to inflict or enjoy unnecessary pain or suffering; inhumanity. . . ." WEBSTER, NEW INTERNATIONAL DICTIONARY 636 (unabr. 2d ed., 1954).

[17]"Cruelty in the law, has no narrowly defined or technical meaning, but is a generic term applicable to all categories of wilful mistreatment, particularly the infliction of *unjustifiable* physical pain or suffering. . . ." 8 ENCYCLOPEDIA AMERICANA 254 (1956). (Emphasis added.)

[18]2 BLACKSTONE, COMMENTARIES 2164-65 (Jones' ed. 1916).

The courts have verged on, but have not expressly embraced the common sense definitions and doctrine that turns on necessity. In *Resweber,* though upholding the punishment, the majority admitted that: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. . . ."[19] The dissent in which Justices Burton, Douglas, Murphy and Rutledge joined, appeared to take a further step toward the literal application of the test of necessity: "Taking life by unnecessary cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily, until, today, some states have prohibited capital punishment altogether."[20]

At least as a philosophical criterion, unnecessary pain and loss in-the-method is not a far cry from unnecessary pain and loss in-the-prescription of punishment. Yet the writer has not been able to find any case where the facts have been placed before any court regarding the necessity for the death penalty itself. An issue of judicially noticeable fact looms as to the necessity or non-necessity for the institution of capital punishment in view of the alternative and available programs including, but not limited to, sentence of imprisonment for a term of years or for life. If there is no necessity for the death penalty, then the death penalty, under the definition stated above, becomes unconstitutional and cannot be imposed legally.

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[19]Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947). (Emphasis added.)

[20]*Id.* at 473.

The definition of cruelty as *unnecessary* pain or loss finds support in the comments of the early writers on republican government. Montesquieu, whose writings constitute to a great extent, part of the heritage of republican theory, commented:

> The severity of punishment is fitter for despotic governments, whose principle is terror, than for a monarchy or republic, whose spring is honor and virtue.
>
> In moderate governments, the love of one's country, shame, and the fear of blame, are restraining motives, capable of preventing a multitude of crimes.
>
> Mankind must not be governed with too much severity; we ought to make a prudent use of the means which nature has given us to conduct them; let us follow nature, who has given shame to man for his scourage; and let the heaviest part of the punishment be in infamy attending it. . . .[21]

The wisdom of the common sense definition is attested not only by the use of the concept of necessity by the Supreme Court of the United States, albeit within a limited framework, but also by reference to ethical concepts. The ethics of republican government lead us to the conclusion that punishment shall not be meted which inflicts pain or loss without necessity. Jefferson and Locke extolled those who are "willing to part with only so much power as is *necessary* for their good government. . . ."[22]

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[21]4 MONTESQUIU, THE SPIRIT OF LAWS, book 6, ch. IX (1900).

[22]LONGMAN'S JEFFERSON PRESENTED BY JOHN DEWEY 54 (1948). (Emphasis added.)

From the standpoint of governmental morality, if we agree with Jefferson, we would deny to the governments such powers as are not necessary for a government to have. And the power to inflict the death penalty is qualitatively different and vastly greater today than any other punitive power in practice.

The critieria of necessity has also been supported as an ethical position by many eminent philosophers. For example, Albert Schweitzer believes that "to a man who is truly ethical all life is sacred, including that which from the human point of view seems lower in scale." In deciding when such life must be taken, Schweitzer would make distinctions only as each case arises, and under the pressure of *necessity.*[23]

As against life imprisonment, and other penological programs, is the death penalty necessary? If it is not, then under several tests, common sense, ethical and legal, the punishment of death constitutes cruelty.

IV. A PROPER FUNCTION FOR PUNISHMENT

Some recent decisions of our state courts suggest another criterion. Under this view capital punishment may be said to comprise unconstitutional cruelty if that institution cannot secure a proper function of society within civilized standards.

The California Supreme Court was called upon to decide whether, among other things, it had been improper for the trial judge to allow the jury to hear a certain tape recording. It seems the police had recorded the dying murder victim's pain, groans, and failing voice.

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[23]SCHWEITZER, OUT OF MY LIFE AND THOUGHTS 233 (1949).

The court, with Justices Schauer and McComb dissenting; reversed and remanded the case to the trial court. After holding that the evidence had no probative value other than showing the victim died in unusual pain, the court discussed the principle of criminal penalties:

> . . . Proof of such pain is of questionable importance to the selection of penalty unless it was intentionally inflicted. . . . Pain unintentionally inflicted is relevant only to the extent that criminal penalties are designed to exact retribution for the evil done by criminals. Whatever may have been the facts historically, retribution is no longer considered the primary objective of the criminal law . . . and is thought by many not ever to be a proper consideration (see M. R. Cohen, *Law and the Social Order,* 310; Holmes, *The Common Law,* 42, 46; *Michael and Wechsler, Criminal Law and its Administration,* 10-11) granted, however, that retribution may be a proper consideration, it is doubtful that the penalty should be adjusted to the evil done without reference to the intent of the evildoer. Modern penology focuses on the criminal, not merely on the crime. . . .[24]

Three of the seven Justices of the California Supreme Court collaterally advanced the position indicated above in a subsequent case, *People v. Harmon,*[25] decided in April 1960. The defendant, a life prisoner, had attacked a fellow prisoner. At the time of the offense the California Penal Code[26] made the death penalty

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[24]People v. Love, 53 Cal. 2d 843, 856-57, 350 P.2d 705, 3 Cal. Rptr. 665 (1960).

[25]People v. Harmon, 54 Cal. 2d 9, 351 P.2d 329, 4 Cal. Rptr. 161 (1960).

[26]CAL. PEN. CODE § 4500.

mandatory for the assault. Just before Harmon's trial, the Penal Code had been amended to make the death penalty optional. The Supreme Court of California had the task of deciding whether the amendment should be deemed retroactive to favor the defendant. The majority held that the death penalty remained mandatory as to the crime committed prior to the amendment. Chief Justice Gibson and Justice Traynor joined with Justice Peters in dissenting, concluding that the defendants should be given the benefit of the amendment:

> . . . There is no logical or rational reason to presume, as does the majority opinion, that the Legislature, in such cases intended the old law to apply. Such a presumption can only be predicated on the theory that *punishment is intended as vegeance against the wrongdoer. This violates all* the modern theories of penology.[27]

Recently, the New York Court of Appeals held that a defendant was entitled to the benefit of mitigated punishment and asserted that:

> This application of statutes reducing punishment accords with the best modern theories concerning the functions of punishment in criminal law. According to these theories, the punishment or treatment of criminal offenders is directed toward *one or more of three ends:* (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not harm society, and (3) to correct and rehabilitate the offender. *There is no place in the scheme for punish-*

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[27]People v. Harmon, 54 Cal. 2d 9, 32, 351 P.2d 329, 343, 4 Cal. Rptr. 161, 175 (1960) (Peters, J., dissenting).

ment for its own sake, the product simply of vengeance or retribution. (See Michael and Wechsler on *Criminal Law and its Administration* (1940), Pages 6-11; Note 55 Col. L.R., Pages 1039, 1052) . . .[28]

There is reason to believe that the above concept is potentially the majority rule of the California Supreme Court and of the United States Supreme Court. Can the death penalty be shown to have a proper function? Certainly its function cannot be that of rehabilitation, nor can it be that of confinement, a function which is thoroughly and efficiently served by imprisonment. The burden is to show that the death penalty constitutes, as compared to life imprisonment, and differentially, a deterrent upon future criminal activities. Unless the death penalty has such a proper function in our society, it would seem to be cruel by definition.

V. THE COMPARATIVE TEST

Another test, somewhat more mechanical, should be included in the contitutional review. If a penalty is more cruel than another punishment already held to violate these constitutional provisions, then the death penalty is unconstitutional as a matter of simple logic. Thus, comparison becomes the relevant factor.

In *Trop v. Dulles,* the Supreme Court held that a punishment generally considered *less* than death, the punishment of deprivation of citizenship, was neverthe-

[28]People v. Oliver, 1 N.Y.2d 152, 160, 134 N.E.2d 197, 201, 151 N.Y.S.2d 367, 373 (1956).

less "cruel and unusual" and violative of the Eighth Amendment:

> . . . There may be involved no physical mistreatment nor primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development. . . . In short, the expatriate has lost the right to have rights.
>
> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. . . . The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. . . .[29]

If *Trop v. Dulles* is now the standard, does the death penalty constitute cruelty as a matter of law, based on comparison to the *Trop* case? And in considering the cruelty of the death penalty we must consider the antecedent and auxiliary processes as inflicted in California, the total experience of the courts and the executioner with respect thereto, and all the facts referable to pain, loss and torture. An issue of fact is tendered, even though the opinion suggests that the punishment attempted in the *Trop* case might be worse than death. The fact issue relates to the comparative pain and loss as between the death penalty with its antecedent waiting period following conviction, on the one hand, and the penalty in *Trop* on the other.

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[29]Trop v. Dulles, 356 U.S. 86, 101-02 (1958).

VI. THE CONTEXT OF MAN'S DIGNITY

Repeatedly the courts advert to still another touchstone of cruelty. Under this test the question whether capital punishment violates the Eighth Amendment is to be answered affirmatively if the punishment violates conscience, morality, humanity, or the dignity of mankind.

In *Trop v. Dulles,* the Court stated: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this limit be exercised within the limits of civilized standards."[30]

A close reading of this decision,[31] and other opinions, particularly the dissenting opinions in the *Resweber* case,[32] leave a reader with a strong impression that a majority of the Justices of the United States Supreme Court disfavor capital punishment, and find it repugnant to their own respective consciences.[33]

The courts have announced that the measurement is to be made in terms of man's dignity. When the judges

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[30]*Id.* at 100.

[31]The majority opinion in *Trop,* in which Justices Black, Douglas and Whittaker joined with Chief Justice Warren, contains this gentle aside: "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful . . ." *Id.* at 99.

[32]Justices Douglas, Murphy and Rutledge joined Justice Burton in referring to capital punishment as "cruelty" at least as it was there to be inflicted. Louisiana *ex rel.* Francis v. Resweber *supra* note 8, at 474 (dissent).

[33]Justice Frankfurter stated that: "A lifetime preoccupation with criminal justice, as prosecutor, defender of civil liberties and scientific student, naturally leaves one with views. Thus I disbelieve in capital punishment. . . ." Haley v. Ohio, 332 U.S. 596, 602 (1948) (concurring opinion).

decide that judgment is to be made on the basis of a determination by the judges, applying their own knowledge, understanding, and historical and social perspective, then it seems capital punishment will be deemed illegal.

There is, as Montesquieu indicated in the eighteenth century, a reciprocal effect of crime and punishment.[34] It might be shown to the courts that historically, the more harsh and the more severe is the scale of punishment, the more degraded is the society as a correlative thereof. It further might be shown that the very act of the sovereign, descending in his majesty upon an offender to vengeful or unnecessarily severe punishment, a punishment that has been prepared by the sovereign with premeditation, coldness and infinite planning, has a symbolic effect upon society far beyond the fact that a life is then taken. This act by the state tends to cheapen the very values that refer to humanity itself, to lower the opinion of humanity regarding itself and to diminish its standards of decency, of conscience and of culture. The practice of capital punishment might be proven to violate the dignity of mankind.

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[34]Montesquieu pointed out that "experience shows that in countries remarkable for the lenity of their laws the spirit of the inhabitants is as much affected by slight penalties as in other countries by severer penalties. . . . Mankind must not be governed with too much severity. . . . If there are other [countries] where men are deterred only by cruel punishments, we may be sure that this must, in a great measure, arise from the violence of the government which has used such penalties for slight transgressions." MONTESQUIEU, *op. cit. supra*, note 21, at ch. IX.,

VII. INTENT OF THE FRAMERS

Story has expressed the view that the provision against cruel and unusual punishment is unnecessary in a free government and was adopted only as an admonition to all departments to warn them against such violent proceedings as had taken place in England under the arbitrary reigns of some of the Stuarts.[35] The Supreme Court's opinion in the *Weems* case asserted that Story's citations[36] did not sustain the theory that the provision was intended to be so limited. The Court's opinion asserted that the framers of our Bill of Rights had something else in mind than merely to add verbiage to our Bill of Rights.

The framers were greatly influenced by the views of Blackstone and Montesquieu.[37] One can, with some force, urge that Montesquieu's and Blackstone's views regarding severity of punishment were shared by the framers and that it was their inclination to eliminate the practices summarized and condemned by Blackstone and ultimately the death penalty, when no longer necessary for the public safety.

The provision against cruel and unusual punishment received very little debate in Congress. According to the Congressional Record there were two primary objections to the adoption of this prohibition in the Eighth Amendment. Mr. Smith felt the phrase "cruel and unusual" was too indefinite. Mr. Livermore contended: "It is sometimes necessary to *hang a man*, vil-

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[35]2 STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1903).

[36]Weems v. United States, 217 U.S. 349, 368-73 (1910).

[37]1 BRYCE, THE AMERICAN COMMONWEALTH 274, 375 (1889).

lains often determine whipping and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?"[38] In the *Weems* case, the Court based its reasoning and conclusion in part upon the fact that the Congress adopted the Eighth Amendment in the face of these objections and must be deemed to have intended to abolish certain cruelties.[39] However, Mr. Livermore also raised a point with regard to the death penalty. Can we not, therefore, conclude that the *Weems* decision is persuasive as to the emergent unconstitutionality of the death penalty?

If the "cruel and unusual" provision is interpreted in a strict manner, as Story suggested, the provision would be virtually a dead letter today. However, under the *Weems* view this prohibition is a vital provision of the Constitution and is available as a weapon to strike down cruelty in any form, and possibly in the form of capital punishment.

VIII. JUDICIAL SELF-RESTRAINT OR NULLIFICATION

The guarantee against cruel punishment is fundamental. The weapon of the Eighth Amendment is made to be wielded, and such wielding is the job of the judiciary. Thus, when the pertinent facts regarding the cruelty of the death penalty are complied and presented the judges ought to notice them; they should not be tabled as legislative matters.

Neither in *Weems* nor in *Trop*, where the United States Supreme Court had the burden to determine

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[38]CONG. REG. 225 (1910). This was referred to in Weems v. United States, 217 U.S. 349, 368-69 (1910).

[39]*Ibid.*

whether the Eighth Amendment was violated, did the Court deem the matter of cruelty to be merely a legislative and/or political question. Having found cruelty the Court struck down the punishments.

In *Trop* the Court pointed out that:

> In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an act of a national Legislature is challenged . . . . When the constitutionality of an act of Congress is challenged in this Court, we must apply those rules. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.[40]

In *Weems*, the Court applied the Eighth Amendment and a similar provision in the Philippine Bill of Rights to that island territory. The provision against "cruel and unusual punishment" was deemed "essential to the rule of law and the maintenance of individual freedom."[41] Since the Philippines were not incorporated at the time of the *Weems* case, only the most fundamental provisions of the American Bill of Rights applied.[42] Thus, is appears clear that the prohibition against cruel and unusual punishment was deemed by the Court in

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[40]Trop v. Dulles, 356 U.S. 86, 103 (1958).

[41]Weems v. United States, 217 U.S. 349, 367-68 (1910).

[42]Dorr v. United States, 195 U.S. 138 (1904) held that the Philippines were not incorporated into the United States, and that the constitutional right of trial by jury did not apply to judicial procedure in the Philippines. Subsequently, and six years after the *Weems* opinion, Congress provided that certain of these "non-fundamental" constitutional privileges be secured to persons in the Philippines, 39 Stat. 546 (1916), 48 U.S.C. § 1008 (1958).

the *Weems* case to be of a fundamental character, as compared, for example, to the less important guarantee of right to trial by jury.[43]

Although the legislature has the power to define crimes and their punishment and to determine the expediency of such laws, the Court has a legal duty to consider the law when it encounters a constitutional prohibition. The Court must then comprehend all that the legislature did or could take into account, considering the mischief and the remedy.[44]

A limited example of judicial consideration of the cruelty of a penalty as a question of fact is *Territory v. Ketchum,*[45] where the penalty of death was sustained in the New Mexico territory after a factual review, albeit superficial. In that case a statute imposed the death penalty upon any person who should make an assault upon any railroad train, for the purpose and with the intent to commit murder, robbery, or other felony upon passengers. The supreme court of the territory discussed the purpose of the Eighth Amendment, and rested its decision upon the conditions which existed in the territory, and the circumstances of terror and danger which accompanied the crime denounced. To take note, as in *Ketchum,* of the "conditions of the territory" is, in a sense, to receive evidence under the several tests suggested herein for testing the death penalty for cruelty. If in a subsequent case the evidence of the "condition of the territory" (state) and of the people, and relevant to the factual issues referable to the definitions of cruelty, establish that the death penalty is in fact cruel, then a court should strike down the penalty.

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[43]See note 42 *supra.*

[44]Weems v. United States, 217 U.S. 349, 378-79 (1910).

[45]Territory v. Ketchum, 10 N.M. 718, 65 Pac. 169 (1910).

To ask a court to consider the cruelty of the death penalty as a question of fact is to ask the court to do what it is required to do by law. And if the death penalty is found to be unnecessary or unconscionable, and thus in fact cruel, the court must wield the Eighth Amendment to strike down this penalty.

IX. CONCLUSION

The term "cruel and unusual" is latently ambiguous to a profound extent. The cruelties and depravities of the middle ages and the Stuart period should to a degree be considered as a background for this constitutional prohibition. However, to exclusively consider past cruelties and fail to notice the present contents and standards perpetrates an anachronism. The phrase is a dynamic intendment and the courts must notice and consider the facts and resulting changed standards of decent conduct marked by our great penologists, wardens, social philosophers, and psychologists.

The same point, the need to consider changing standards, may be made as to the other suggested tests for determining the cruelty and, thus, unconstitutonality of the death penalty. What is necessary, under the test of necessity, changes with the changed knowledge, increased skills and improved facilities for incarceration, rehabilitation and for public education. Equally, necessity is to be judged by each era based on the scientific facts, such as factors of motivation and deterribility known to the judges of that era.

The ambiguity of the phrase "cruel and unusual" is latent and the latency resides in contemporary society and in the new facts which it harbors. To bring the artifacts and evidence of those facts to the court-

room is to fill out the dimensions of the question in the public law.

In terms of historical fact and tendency, the advances of man's liberty and of man's culture and civilization is accompanied by lessening of severity of punishment. It is also accompanied by an increasing appreciation and valuation of life itself.

The courts should seriously consider the changed and advanced standards of our civilization in determining if the death penalty is unconstitutional as cruel and unusual punishment.

APPENDIX B.

[VOL. 15, CRIME AND DELINQUENCY PAGE 1, JANUARY 1969]

Capital Punishment.*

Gerald H. Gottlieb

In simplest terms, the thesis of this paper is that the death penalty is torture, that it serves no other purpose than revenge, that revenge is an unconstitutional purpose, and that torture is an unconstitutional act. The supporting narrative relies upon historical and present facts and upon law. It offers a prediction that our courts will strike down the penalty, applying those facts to the Eighth Amendment of the Bill of Rights.

Departing from that narrative, I venture some personal expressions. To maintain an institution that sets a barbaric example is to thwart the civilizing process that holds man's only hope for survival. The death penalty is the most dramatic symbol of barbarism present in our national domestic life. It is not the only barbarism, yet to remove it is to sound a civilizing chord that will reverberate across the nation and its laws.

Raw punishment, in whatever form, is no answer to crime. The appropriate question is how to prevent and cure criminality—in those already miscreant, in those so inclined, and in those whose character is still unformed. The answer to the ques-

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tion must be relevant to the massive causes and subtle triggers of criminality.

* * *

Description of the larger tasks involved in the prevention and cure of criminality is beyond the scope of this paper and of any single investigator. It requires dialogue among all the pertinent disciplines and sciences. Its context is vast. The labors entail nothing less than the building of the Just Society.

The death penalty is but one of the obstacles now to be cleared away in order to permit construction of that edifice.

Revenge is no longer a proper objective of punishment. So say the highest courts of California and New York. The implications extend to the death penalty itself. This newly adopted philosophy, together with a realistic look at our Death Rows and a glance at our developing ethical structure, suggests that the courts may now be willing to *test* the constitutionality of the death penalty. The rule against "cruel and unusual" punishment, the U.S. Supreme Court said recently, applies as a fundamental guarantee not only to the federal government but also to the states. This indicates that capital punishment, if tested in the courts, might now be held illegal under the Bill of Rights, specifically in terms of the Eighth Amendment, which states that "cruel and unusual punishment" may not be inflicted.

In December 1965 the California Supreme Court declared in *In re Estrada* that punishment or treatment of criminal offenders should be directed toward one or more of three ends: (1) to discourage and act is a de-

terrent upon future criminal activity, (2) to confine the offender so that he may not harm society, and (3) to correct and rehabilitate him. "There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." The court observed that these sentiments have generally been approved by legal writers and referred to a 1961 essay, "Testing the Death Penalty," in which I had proposed that the new philosophy of punishment would permit and ultimately require the courts to test capital punishment under the Eighth Amendment to the Constitution.

Of the three ends of punishment now acceptable to the California (and New York) courts, obviously death cannot rehabilitate. Obviously, also, confinement of the offender is accomplished by imprisonment. Does the death penalty act as a greater deterrent to crime than imprisonment?

The California Supreme Court, in another decision (*People v. Love,* 1960), noted: "There is . . . no legislative finding, and it is not a matter of common knowledge, that capital punishment is or is not a more effective deterrent than imprisonment." Three years later, the same court stated more emphatically in *People v. Ketchel:* "The sought imposition of the death penalty thus rests on the unproved and illegitimate assumption that it acts as a deterrence to the described 'potential killer.' . . . Indeed, no evidence supports the plethora of insinuation and implication of the deterrent of the death penalty implicit in the prosecution's argument."

The last link in the chain was supplied by the United States Supreme Court. *Robinson v. California,* in 1962, held that the command of the Eighth Amendment of the Constitution is embraced within the com-

mands of the due process clause of the Fourteenth Amendment and thereby applies to the states.

The facts indicate that the expanded meaning of the term "cruel," and the nature of capital punishment, put that penalty outside the pale of acceptable forms of punishment. Viewed against the decisions quoted here, the facts permit no justification for the maintenance of Death Rows. As far as I know, no courts in the country have yet been presented with the facts relating to the death penalty and to society's developing standard of what is to be deemed "cruelty." It is fair to conclude, I believe, that in due course the courts will no longer permit states to inflict the death penalty.

I.

The Meaning of Cruelty.

It is the law that "cruelty" is to be defined not in terms of the excesses existing when the term was inserted in the Bill of Rights, but rather in terms of the contemporaneous condition of society. As early as 1910 the U.S. Supreme Court declared in *Weems v. United States:* "Legislation . . . should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth." This dynamic view received express ratification in 1958, in *Trop v. Dulles,* when the Supreme Court said: "The words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. . . . The basic

concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."

Merely to assert that death is the ultimate cruelty and therefore must be unconstitutional is to recite a tautology. It is appropriate to go to the facts to gather whatever may indicate the present standards that "mark the progress of a maturing society."

Society applies its standards in many pursuits. We may detect changes in the standard of decency between the seventeenth, eighteenth centuries and the present era by looking at various domestic activities of Western society. Comparison of how it has treated its offspring, its seamen, its accused persons, its working females, its cripples, its pupils, its industrial and agricultural workers, its insane persons, etc., in earlier times and in the present shows an explosive expansion of the concept of cruelty.

Children were once subject to the same criminal jurisdiction as adults. Mixed almshouses and indenture provided most of the care for dependent children for the fifty years preceding 1875. The cotton factories established in the country districts of Lancashire and Yorkshire toward the close of the eighteenth century were worked largely by children from London and other towns, brought to the country in cartloads and housed in overcrowded and unsanitary dormitories. Corporal punishment of the insane and feeble-minded was the common practice. Insanity was looked upon as mere perversity. It was believed that severe flogging could produce fear and thus enforce discipline.

Throughout the Middle Ages, cripples occupied the status of mendicants and children were mutilated to make them valuable as beggars. It was not until 1634 that St. Vincent de Paul established the first haven for their protection—one of the first institutions for child care. Institutions for the care and education of crippled children were first established in Munich in 1823, in Paris in 1853, and in New York in 1863. (In the United States the first state to provide for crippled children at public expense was Minnesota—as late as 1897.)

Massachusetts, the most industrialized of the American states, was the pioneer in labor legislation, but it was 1836 before it enacted the first statute providing schooling for employed children. In 1842 it passed a ten-hour work law for children under twelve years of age. In 1876-1877 it broke new ground when it enacted a ten-hour law for women, a law requiring the employment of factory inspectors, and a law on industrial safety.

In the United States, after the abolition of slavery, peonage became a penalty for vagrancy and petty crimes, especially when committed by Negroes. It became customary in many areas to impose a fine and to accept payment of it from an employer of labor who then secured the services of the culprit until the amount of the fine had been worked out. A system of long-continued, if not permanent, involuntary servitude developed, and it was not until 1910 that the Supreme Court ruled state laws under which peonage had been tolerated to be unconstitutional.

The "packet rats" of the Atlantic sailing ships of the early nineteenth century were often made into desperate

characters by the "bucko mates" who kicked and bullied them into submission and not infrequently maimed or murdered them. In certain medieval codes actual dismemberment was countenanced as a punishment for specified offenses. Flogging persisted well into the nineteenth century. Today, corporal punishment is prohibited and elaborate regulations provide for the safety of vessel and crew and for the sanitary conditions of food and living quarters.

Thus, in the domestic affairs of society an expansion of the definition of "cruelty" has clearly occurred. We cannot, of course, put it to a quantitative yardstick of measurement. If we could, I suggest that although we have far to go before attaining a truly humane society, the expansion would be found to have raised our standard of decency and humanity in domestic life many times over what it was in earlier centuries.

If society today, through its courts, should apply the same standard to its criminals as it does in its other pursuits, might it not sweep away the Death Rows, the gas chambers, the death wait, and the death penalty itself?

II.

The Death Penalty vs. Other Extreme Penalties.

Dostoevsky wrote *The Idiot* with the experience behind him of having faced a firing squad right up to the moment of execution. He described the feeling of approaching execution in this way: "But the chief and worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and

that one will cease to be a man and that that's bound to happen; the worst part of it is that it's certain. . . . To kill for murder is a punishment incomparably worse than the crime itself. Murder by legal sentence is immeasurably more terrible than murder by brigands. Anyone murdered by brigands, whose throat is cut at night in a wood, or something of that sort, must surely hope to escape till the very last minute . . . but in the other case [execution] all that last hope, which makes dying ten times as easy, is taken away for certain. There is the sentence, and the whole awful torture lies in the fact that there is certainly no escape, and there is no torture in the world more terrible. . . ."

Albert Camus also equated the death penalty with the most extreme forms of punishment. He was unable to see anything in capital punishment but a "penalty the imagination could not endure." In "Reflections on the Guillotine" he shared Arthur Koestler's conviction: the death penalty "besmirches our society, and its upholders cannot reasonably defend it. . . ." He held it to be the most premeditated of murders, to which no criminal's deed, however calculated it might be, could be compared. The only equivalent would be a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment, had confined the victim for months. "Such a monster," wrote Camus, "is not encountered in private life."

Describing the anguish of the condemned, Camus wrote: "He hopes by day and despairs of it by night. As the weeks pass, hope and despair increase and become equally unbearable. According to all accounts, the

color of the skin changes, fear acting like an acid. . . . What criminal ever reduced his victim to such a desperate and powerless condition?"

Camus believed that this oscillation process, over time, is the cause of the odd submissiveness that is customary in the condemned at the moment of their execution. These men who have nothing more to lose could try to run away and thus die of a chance bullet or engage in the kind of frantic struggle that dulls all the faculties and be guillotined feeling less. In a way, Camus said, this would amount to dying freely. And yet, with few exceptions, the condemned walk toward death passively in a sort of dreary despondency. He sums up by noting an absurdity: "As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second, whereas he killed but once. Compared to such torture, the penalty of retaliation seems like a civilized law. It never claimed that the man who gouged out one of his brother's eyes should be totally blinded."

There is strong indication that the death penalty was associated in the eighteenth century and earlier with punishments considered to be torture. In 1750 Blackstone wrote in his *Commentaries on the Laws of England*: "Of these [punishments] some are capital, which extend to the life of the offender, and consists generally in being hanged by the neck until dead, though in very atrocious crimes other circumstances of terror,

pain, or disgrace are superadded; as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, emboweling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. . . . Some punishments consist in exile or banishment. . . . Some, though rarely, occasion a mutilation or dismembering, by cutting off the hands or ears. . . ."

We no longer cut off ears, but we still kill. The explosion in the meaning of cruelty between that early era and now has not yet brought the courts to declare the death penalty unconstitutional. This can mean that the courts await the presentation of facts; or that the injunction aganst cruelty is to be taken seriously by society in all pursuits *except* punishment; or that Camus and Dostoevsky and all the other writers then and now are wrong, and death is not, with its antecedent—waiting—the practical equivalent of other tortures and extreme penalties.

This essay proceeds from the first proposition. The second proposition is contradicted by the fact that the *only* place in our Constitution where the term "cruelty" is used is in relation to its prohibition regarding punishment. The third proposition flies in the face of the human experience of men honored for their ability to observe and transmit in words the reality of that experience.

III.

The Significance of Concealment.

Public knowledge of the realities of execution today is remote, for the people are protected by prison walls and a semantic veil. The symbols but not the substance reach them. It is of the greatest significance, I suggest, that executions are carried out away from the public eye and that the public spectacle of hangings and beheadings has been left behind to earlier centuries. This is evidence that if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of humanity and of human dignity and decency. Our systematic concealment of executions creates a strong inference that capital punishment now falls under our expanded definition of "cruelty," particularly when we contrast this present custom of secrecy with the one-time public display of executions.

Boswell tells us of the eighteenth century attitude in his "The Hypochondriac LXVIII" in the *London Magazine:* "When I first attended executions, I was shocked to the greatest degree. I was in a manner convulsed with pity and terror, and for several days, but especially nights after, I was in a very dismal situation. Still, however, I persisted in attending them, and by degrees my sensibility abated; so that I can now see one with great composure, and my mind is not afterward haunted with frightful thoughts: though for awhile a certain degree of gloom remains upon it. I can account for this curiosity in a philosophical manner, when I consider that death is the most awesome object before every man. . . ."

In the next century Charles Dickens, in a letter to the London *Times*, described the wickedness of the crowd and the absence of restraint or pity, and in a letter to the *Daily News* in 1846 he noted the interaction between public execution and the public's valuation of life: "I have stated my belief that the study of such scenes leads to the disregard of human life, and to murder. Referring since that expression of opinion to the very last trial for murder in London, I have made inquiry and am assured that the youth now under sentence of death in Newgate for the murder of his master . . . was a vigilant spectator of the three last public executions in this City. . . . In reference to this very question of Capital Punishment, Robespierre himself, before he was 'in blood steeped in so far,' warned the National Assembly that in taking human life, and in displaying before the eyes of the people scenes of cruelty and the bodies of murdered men, the law awakened ferocious prejudicies, which gave birth to a long and growing train of their own kind."

A few years earlier, in 1840, William Makepeace Thackeray wrote "Going to See a Man Hanged" and observed: "Many young dandies are there with moustaches and cigars; some quiet, fat family-parties of simple, honest tradesmen and their wives, as we fancy, who are looking on with the greatest imaginable calmness, and sipping their tea."

Thackeray continues: "I must confess . . . that the sight has left on my mind an extraordinary feeling of terror and shame. It seems to me that I have been abetting an act of frightful wickedness and violence, performed by a set of men against one of their fellows; and I pray God that it may soon be out of the power of

any man in England to witness such a hideous and degrading sight. Forty thousand persons (say the Sheriffs), of all ranks and degree—mechanics, gentlemen, pickpockets, members of both Houses of Parliament, streetwalkers, newspaper-writers, gather together before Newgate at a very early hour; the most part of them give up their natural quiet night's rest, in order to partake of this hideous debauchery, which is more exciting than sleep, or than wine, or the last new ballet, or any other amusement they can have. Pickpocket and Peer each is tickled by the slight alike, and has that hidden lust after blood which influences our race.

". . . I fully confess that I came away from Snow Hill that morning with a disgust for murder, but it was for the murder I saw done."

Henry Fielding, writing a century earlier, considered that the punishment of the condemned person would be increased and intensified if his execution were to be made private: "If executions . . . were so contrived that few could be present at them, they would be much more shocking and terrible to the crowd without doors than at present, as well as much more dreadful to the criminals themselves, who would thus die in the presence mainly of their enemies. . . . Nothing can, I think, he imagined (not even torture, whic I am an enemy to the very thought of admitting) more terrible than such an execution; and I leave it to any man to resolve himself upon reflection, whether such a day at the Old Bailey or a holiday at Tyburn would make the strongest impression on the minds of everyone."

William Curtis Bok, who was a justice of the Pennsylvania Supreme Court, stated in *Star Wormwood:* "It

is strange how people talk about deterrence and the death penalty. Great publicity is given to war and its horrors under pious captions that knowledge of its horror may deter the race from future war. But no publicity is given to executions, though the argument for deterrence is the same. Why not show executions in motion pictures, television, stage, and press, so that all may see, if they have such magnificent deterring power? Why is the state so ashamed of its process that it must kill at dead of night, in an isolated place, and on an unnamed day?"

The act of hiding an evil from the conscience permits the inference that the conscience has been assaulted by the very evil from which it retreats.

IV.

Behind the Walls.

The judges are, after all, the final protectors, without which no Bill of Rights would be worth the writing. Courts may not abdicate those duties. The task is to bring the realities of "cruel punishment" to the individual judges, fact by fact, and human being by human being. Let us look at some descriptions of scenes on "the Row" at San Quentin Prison as recorded by a warden, a chaplain, and a doctor of medicine who attended the inmates for several years.

In *88 Men and 2 Women* Warden Clinton T. Duffy describes the first execution after he took over his job—that of George Costello. Three days before his scheduled execution Costello slashed his throat with a razor blade. This necessitated a postponement. Dr. W. P. Goddard wrote the warden that "while Costello would probably be able to mount the scaffold on schedule, the

wound would open when he dropped, considerable hemorrhaging would result, and the doctor could not guarantee that the head wouldn't be completely severed." The Governor granted a reprieve for the sole purpose of giving him time to recover sufficiently for an execution that would not be too messy."

Some of Duffy's subjects marred the quietness of the "perfect execution": the condemned do not always die gracefully. He describes a prisoner named Northcott at a period before Duffy became warden and was Warden Holohan's secretary. Northcott claimed to have taken poison but, as it proved, he was just "scared to death":

". . . 'Must I see it all?' Northcott asked. 'Can't I have a blindfold?' The warden, his face ashen, nodded, and a black cloth was wrapped around the boy's eyes. His hands shook so much that it took two guards to hold them in position long enough to be strapped together.

"He was utterly petrified. . . .

"Behind me, I heard him sob, 'Please—don't make me walk too fast.' I didn't have to turn around to know that the guards were dragging him. He was almost limp when they reached the foot of the gallows. As he was carried up the thirteen steps, he let out a succession of hoarse cries which increased in intensity until the big room sounded like a madhouse."

Former Row Chaplin, Byron E. Eshelman, wrote in *Death Row Chaplain* of the execution of Robert Pierce, who was about twenty-four at the time of his arrest for the murder of a cab-driver. (The robbery had netted him about seven dollars.) Pierce had spent three years on the Row and made no secret of the fact that he

planned to "die hard." The day before his "last elevator ride," Pierce kicked the toilet loose from his cell wall. He was placed in isolation.

The next morning, the chaplain approached Pierce's cell. The condemned man was covering his face with his hands, then looked up and grinned.

"Blood was pulsing from his neck," wrote Chaplain Eshelman.

A medical officer and a lieutenant of the guards hurred into the cell and Pierce tried to fight them off.

"They pinioned his arms, discovered a four-inch gash across the right side of his throat, all the way up to the ear."

The warden ordered four guards to drag Pierce from the holding cell and carry him into the gas chamber. He fought all the way down the corridor, screaming, "Lord . . . You know I'm innocent."

Blood sprayed from his neck as he was carried inside the gas chamber.

" 'I'm innocent,' he screamed at the witnesses. 'Don't let me go like this. Oh, God!'

"Two witnesses got sick and had to leave."

Leandress Riley, too, had aroused concern that he would die "badly." When the final hour arrived, a guard unlocked his cell. Riley gripped the bars with both hands and began a long bone-chilling, wordless cry. The guards pulled him from the bars and stripped off his shirt and trousers. His flailing arms and legs were forced into a white shirt and blue denims.

The deep-throated cry continued, alternating with moaning and shrieking. Riley was carried to the gas

chamber, fighting and writhing all the way. Using all their strength, the guards held him while the doctor taped the ends of the stethoscope in place.

The tension aroused in a condemned man awaiting the approach of the fatal hour is intolerable; often he chooses suicide as a solution to the anxiety and despair. A year after Pierce's execution, Eshelman writes, Oscar Burst, condemned for killing his wife and sixteen-year-old stepson, cut his throat with a piece of mirror the day before he was to go downstairs. Ralph Rogers, known as "little Navajo," jammed the lock of his cell with cloth, tied his mattress ticking to the ventilator grill, twisted the other end around his neck, and hanged himself by stepping off the toilt seat. Boyd Van Winkle awaited his execution in the prison hospital. Each night he was given a sleeping pill. He "tongued" his pills until he had saved a lethal dose, then took them all one night. He never recovered from his coma.

Others, unable to stand the waiting, go insane. In *The San Quentin Story,* Warden Duffy discusses the case of Edwin Walker: "I shook Walker gently and spoke to him. He shrank from my touch and stared at me, but there was no recognition in his eyes. He seemed to be in a state of profound shock; his lips moved but made no sound.

". . . The next morning, with the official witnesses waiting outside the gas chamber and the executioner standing by, seven consulting physchiatrists crowded into the little death cell to look at a broken shell of a man. Walker was mumbling to himself, crawling like a whipped dog on the floor, and hiding his head under a blanket. At intervals he burst into tears, and jumped wildly at the slightest touch. The doctors were unable

to make him talk, and at 10 a.m., the hour set for Walker's death, they signed a statement declaring he had gone insane. . . ."

For the condemned who can survive anxiety and despair while awaiting his hour without attempting suicide or going completely out of his mind, there is a final involuntary humiliation. Again and again, those about to be executed experience a loss of control of the sphincter muscles and find, to their horror, that they have soiled themselves. A natural relaxation of these muscles is a result of death; but for it to occur in advance of it can only be explained by the presence of uncontrollable and inordinate fear.

Dr. William F. Graves, during his period of service as a medical officer at San Quentin, made some fifty visits on the Row, examining each condemned inmate to determine his physical and mental status and to recommend any treatment that might be needed. In an interview he told me that at the end of this service he was left with the clear conclusion that, although the professional and custodial staff of the institution exert every reasonable and honest effort to make Death Row tolerable both to its inmates and to the staff, its grim mechanics turn it into a form of punishment as cruel as any man has yet devised.

Death Row is a shock, he said, for nearly all of the inmates placed there. For those with a potential for growth and rehabilitation, the shock may actually cause the inmate to think seriously for the first time in his life, to learn to read and write, to understand the world about him better. In these cases, the cruelty of Death Row and of capital punishment lies more in the fact that we are then executing not the original criminal but

a redeemed man. In more cases, however, the shock of Death Row results in accelerating the process of mental deterioration.

Dr. Graves cited the case of Henry Ford McCracken, a man whose tiny head caused Graves to regard him as a probable microcephalic: "During his stay on Death Row, McCracken became no more than a vegetable. On one occasion I found him wallowing on the floor of his cell in his own excreta babbling incoherently. I arranged to have him transferred to the prison hospital where he was given electric shock therapy—this to bring him to a point of sanity at which he might be considered able to understand that he was being punished at the time of his execution."

Graves commented that others intelligent enough to understand their fate fought furiously, both mentally and emotionally, against it: "I remember Gilliam. When I saw him first, seated at the rear of his cell hunched over his small table with great beads of sweat literally pouring from his face onto the open Bible he was studying, I was accompanied by a prison official who handed him a court document. . . . He took the document. The attendant attempted to console him. This was quite fruitless. He returned to his Bible to literally sweat out the remaining days before the date scheduled for his execution. As I recall it, he did eventually receive a brief stay, only some weeks later to again go through a similar period of agony in expectation of the State's taking his life on an appointed day at an appointed hour."

Our society is based on a belief in the inherent dignity of man. Surely anything which undermines that dignity must be viewed as abhorrent to it. There is no need to relate more of these morbid vignettes.

V.

The Innocents.

There is yet a further victim of the ritual: the family of the condemned. In discussing the case of Edwin Walker, Warden Duffy wrote: "Eventually the courts turned down all Walker's appeals, and his father, crushed by the costly and futile fight for his son's life, committed suicide." Regarding the Louise Peete case: "Richard Peete [her husband] . . . suffered agonies while she was on trial for . . . murder, couldn't stand the shock of her sentence and committed suicide. . . . The records also revealed that a Dallas hotel clerk who had been friendly with Louise was found dead one day with a bullet in his head, an apparent suicide."

Sing Sing Warden Lewis E. Lawes wrote in *Life and Death in Sing Sing* that capital punishment is a punishment that falls most severely on the family of the defendant; the murderers' torment eventually ends but the wives, the mothers, the children, continue to suffer after the executions. "I yield to no one," Lawes said, "in acknowledging the duty we owe to the family of the murderer's victim, but I have very grave doubt whether society is right in inflicting this terrible burden on the innocent family of the murderer, believing, as I do, that the punishment serves no purpose other than to get rid of the murderer."

Victor Hugo wrote in *The Last Days of the Condemned:* "The alternatives are these: first, the man you destroy is without family, relations, or friends in the world. In this case, he has received neither education nor instruction; no care has been bestowed either on his mind or heart; then, by what right would you kill this

miserable orphan? You punish him because his infancy trailed on the ground, without stem, or support: you make him pay the penalty of the isolated position in which you left him! you make a crime of his misfortune. No one taught him to know what he was doing; this man lived in ignorance: the fault was in his destiny, not himself. You destroy one who is innocent.

"Or, secondly;—the man has a family; and then do you think the fatal stroke wounds him alone?—that his father, his mother, or his children will not suffer by it? In killing him, you vitually injure all his family: and thus again you punish the innocent.

"Blind and ill-directed penalty; . . . on whatever side it turns, [it] strikes the innocent!"

VI.

The Test of Necessity.

Cruelty is properly definable as "the infliction of pain or loss without necessity or justification." Blackstone considered necessity to be a prerequisite of the death penalty and noted that the necessity must be great and overriding: ". . . But, indeed were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity . . . of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public road by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier who defeats or eludes the provisions of former statutes. . . ."

The courts have verged on, but have not expressly embraced, the common-sense definitions and doctrine that turn on necessity. In the *Resweber* case in 1947, though upholding the punishment, the Supreme Court majority admitted that: "The traditional humanity of modern Anglo-American law forbids the inflicting of unnecessary pain in the execution of the death sentence. . . ." The dissenting opinion contained this statement: "Taking life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily, until, today, some states have prohibited capital punishment altogether."

Unnecessary pain and loss in-the-method is not a far cry from unnecessary pain and loss in-the-prescription of punishment. Yet there has been no case where the facts have been placed before any court regarding the *necessity* for the death penalty. If there is no necessity for it, then, under the definition stated above, it becomes unconstitutional and cannot be imposed legally.

The definition of cruelty as *unnecessary* pain or loss finds support in the comments of the early writers on republican government. Montesquieu commented: "The severity of punishment is fitter for despotic governments, whose principal is terror, than for a monarchy or republic, whose spring is honor and virtue. In moderate governments, the love of one's country, shame, and the fear of blame, are restraining motives, capable of preventing a multitude of crimes. Mankind must not be governed with too much severity; we ought to make a prudent use of the means which nature has

given us to conduct them; let us follow nature, who has given shame to man for his scourge; and let the heaviest part of the punishment be in infamy attending it. . . ."

VII.

Our Changing Standards.

The world trend today is toward abolition of capital punishment. In the United States, Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin have all abolished it by law. A few other states—New York, North Dakota, Rhode Island, and Vermont—retain it for a second-time murderer or for the slaying of a police officer or for murder by a lifer. During the past two decades, lack of use of the death penalty has virtually abolished capital punishment in many states in which the law still allows it. From the peak year of 1935 when 199 persons were executed, the number of executions has been dramatically reduced: 1962, thirty-seven; 1963, twenty-one; 1964, fifteen; 1965, seven; 1966, one.[1]

On the national level federal penal institutions maintain no means for carrying out the death sentence; state facilities are used whenever necessary. But only one federal prisoner has been executed since 1957. In the armed forces, the last execution in the Army took place on April 13, 1961, the last execution in the Navy was on December 1, 1842.

Deputy Attorney General Ramsey Clark,[2] in a speech in July, 1965, gave the views of the Department of

[1]In 1967 there were two executions; in 1968, through Dec. 1, none.—Ed.

[2]Appointed attorney general in February 1967.—Ed.

Justice on capital punishment: "We favor the abolition of the death penalty. Modern penology with all its correctional and rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals. This nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime."

In *88 Men* Warden Duffy was of the same opinion: "I hate the death penalty because it is not the deterrent to crime that its advocates claim. . . . I have yet to meet the man who let the thought of the gas chamber stop him from committing murder."

Similarly, Boris Pasternak wrote in *Doctor Zhivago:* "If the beast who sleeps in man could be held down by threats—any kind of threat, whether of jail or retribution after death—then the highest emblem of humanity would be the lion tamer in the circus with his whip, not the Prophet who sacrificed himself."

The facts of death are not matters of geography. A statement by the Ceylon Commission of Enquiry on Capital Punishment (1959) included the following: "It is . . . our view that the statistics of homicide in Ceylon . . . tend to disprove the assumption of the uniquely deterrent effect of the death penalty, and that . . . reintroduction [of capital punishment] cannot be justified on the argument that it is a more effective deterrent to potential killers than the alternative of protracted imprisonment."

In a lecture, Dr. Karl A. Menninger argued that the commission of terrible acts is not deterred by terrible

threats of retaliation. Sexual atrocities, for example, are caused by mental disturbance and many such cases can be corrected. "Meanwhile," Menninger added, "our duty as people is to work until we can correct the disturbances, and not take lives or dose out terrible punishments with the thought that by doing so we can deter future crimes."

If the death penalty were to be put on trial metaphorically and charged with being unconstitutionally cruel, testimony by the legion of wretches who have suffered it and by those who have written against it might well open the proceedings. They would testify that the death penalty assails the dignity of man, is inhuman, and violates all standards of decency. Tolstoy would say, "Only to the extent to which people renounce violence and establish their relationships on rational considerations, will there be a real future for the life of mankind." Shelley would say: "The first law which it becomes a Reformer to propose and support, at the approach of a period of great political change, is the abolition of the punishment of death. . . . It is sufficiently clear that revenge, retaliation, atonement, expiation, are rules and motives so far from deserving a place in any enlightened system of political life that they are the chief sources of a prodigious class of miseries in the domestic circles of society." The continuing victim is mankind.

Of the acceptable purposes of punishment, the proponents of the death penalty cannot prove its power to deter. When comparisons are made between adjoining states of the United States with similar populations and similar social, economic, and political conditions—some of them lacking and other retaining capital punish-

ment—homicide rates are the same and have followed the same trend over a long period of time. The rate of policemen killed by criminals, for example, is no higher in abolitionist states than in comparable death-penalty states. Moreover, when *all* of the states are separated into abolitionist and executionist states and each group is averaged, the homicide rate in the executionist states is far higher.

The British World Commission, after making an exhaustive examination of capital punishment, concluded: "Whether the death penalty is used or not, both death penalty and abolitionist States show homicide rates which suggest that these rates are conditioned by other factors than the death penalty. . . . The general conclusion which we have reached is that there is no clear evidence in any of the figures that we have examined that the abolition of capital punishment has led to an increase in the homicide rate or that its reintroduction had led to a fall."

VIII.

Conclusion.

Against such facts and opinions we lay the difficult yardstick of the law: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that his power be exercised within the limits of civilized standards." (*Trop v. Dulles*).

The Eighth Amendment was required by the people as one of those fundamental rights essential to the government which it was then forming. The Amendment imposes a limit upon the power of government. We as a people share with Jefferson a jealousy of powers ar-

rogated or unnecessarily retained by the State, and it seems clear that maintenance of the death penalty involves government in the use of power beyond that permitted by our Bill of Rights.

It might be shown to the courts that, historically, the more harsh and the more severe the scale of punishment, the more degraded is the society as a correlative thereof. It further might be shown that the very act of the sovereign, descending in his majesty upon an offender to give vengeful or unnecessarily severe punishment, a punishment that has been prepared with premeditation, coldness, and careful planning, has a symbolic effect upon society far beyond the fact that a life is then taken. The act by the State tends to cheapen the values that refer to humanity itself, to lower the opinion of humanity regarding itself, and to diminish its standards of decency and conscience.

The pertinent facts regarding the death penalty should be presented and tested in the courts. The ambiguity of the phrase "cruel and unusual" is latent, and the latency resides in contemporary society and in the new facts that it harbors. To bring the artifacts and evidence of those facts to the courtroom is to fill out the dimensions of the question in the public law. In terms of historical fact and tendency, the advance of man's liberty and of man's culture and civilization is accompanied by a lessening of the severity of punishment. It is also accompanied by an increasing appreciation and valuation of life itself. Unless the burden of justification for the inflicting of the penalty can be supported, the judges, wielding the blade of the Eighth Amendment, should strike it down as unconstitutional.

* * *

[POSTSCRIPT]

The point might be raised that another provision of the Bill of Rights to our Constitution seems to contradict the application of the Eighth Amendment to capital punishment. This counter-argument is that the command against cruel punishment in the Eighth Amendment is contravened by the fact that the taking of life is mentioned in the Fifth Amendment.

The Fifth Amendment says: "A person shall not be deprived of life, liberty or property without due process of law." One might argue that this provision necessarily provides that life, as well as liberty or property, *may* be taken as punishment for at least some crimes.

In initial response to this counter-argument, four things beyond what is in my paper should be noted:

First: Immediately preceding the above-quoted clause, the Fifth Amendment states, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." If we take the counter-argument seriously, this language of the Fifth Amendment should also imply that limb may be taken as punishment for at least some crimes.

"Limb" as a noun means a leg or arm of a human being; as a verb it means "to dismember, to cut or tear off the limbs of." The taking of limb is torture already held cruel and therefore unconstitutional.

The counter-argument, if followed to its logical conclusion, would revert us to the practices described by Blackstone.

Second: When the first Congress of the United States came to draft the Eighth Amendment, it was reminded that the words "cruel and unusual punish-

ment" might some day prohibit capital punishment. Mr. Livermore, speaking on the proposed prohibition against "cruel and unusual" punishments, addressed the members: "It is sometimes necessary to hang a man, villains often deserve whipping and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? The first Congress noted the remarks and, even so, went on to propose the Eighth Amendment.

Third: The counter-argument says, in effect, that because taking of life is mentioned in the Fifth Amendment, along with taking of liberty and of property, the Eighth Amendment cannot make illegal all life-taking nor all liberty-taking, nor all property-taking. If, then, we merely urged that the Eighth Amendment prohibits the killing of offenders under twenty-one, or the killing of offenders in states that have good prison systems which provide sufficient alternative punishment, or the taking of the lives of first offenders as compared with recidivists, the argument falls. In other words, the argument at most says that some vestige of the life-taking power of the State must be left to it in order to recognize the force of the Fifth Amendment.

Fourth: The Eighth Amendment vastly differs from the Fifth in its treatment of the subject of kinds of punishment. The Eighth confronts the subject head-on in clear proscription: ". . . nor shall cruel and unusual punishments be inflicted." The Fifth Amendment does not *confront* capital punishment. It merely notes the subject in the course of stating a series of injunctions against (a) holding to answer unless on a presentment or indictment; (b) subjecting a person to

be twice put in jeopardy for the same offense; and (c) depriving a person without due process of law.

The evils attacked in the Fifth Amendment, in other words, are the evils of prosecution without safeguards. The evil attacked in the Eighth Amendment is the evil of punishments that may be cruel. Mr. Justice Marshall stated: "We must never forget that it is a *constitution* we are expounding." Professor Paul Freund has said that "in its most enduring and memorable decisions, the Court has been careful not to read the provisions of the Constitution like a Last Will and Testament lest, indeed, they become one."